

March 3, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

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Docket No. 70-3103

NRC STAFF RESPONSE TO MOTION ON BEHALF OF INTERVENORS
NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN
FOR ADMISSION OF LATE-FILED CONTENTIONS

INTRODUCTION

Pursuant to the Board's Order of February 14, 2005,¹ the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the motion filed by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC")² requesting the admission of late-filed contentions. As discussed below, the factors which control the admission of late-filed contentions weigh against admission of all but one of the proffered contentions. In addition, for all but that one contention, the supplemental bases and contentions proffered by NIRS/PC are not admissible under the Commission's regulations.

BACKGROUND

NIRS/PC filed its petition to intervene and contentions with regard to the application by Louisiana Energy Services, L.L.P., ("LES") to construct and operate the proposed National Enrichment Facility ("NEF") on April 6, 2004.³ NIRS/PC sought admission of several contentions, one of which alleged that LES did not have a plausible strategy for disposal of the depleted uranium

¹ *Memorandum and Order* (Post-Evidentiary Hearing Administrative Matters).

² "Motion on Behalf of Intervenors Nuclear Information and Resource Service and Public Citizen for Admission of late-Filed Contentions," February 2, 2005 ("Late-Filed Motion").

³ "Petition to intervene by Nuclear Information and Resource Service and Public Citizen" and "Contentions on the Construction Permit/Operating License Application for the National Enrichment Facility Made by Nuclear Information and Resource Service and Public Citizen" ("NIRS/PC Contentions") April 6, 2004.

("DU") that would be produced. Other contentions proffered by NIRS/PC alleged that LES failed to discuss the environmental impacts of the plant which will convert the tails to a more stable form for disposal, NIRS/PC Contentions at 31-32, and challenged the costs LES attributed to conversion and disposal of DU, NIRS/PC Contentions at 34-38. The Board granted NIRS/PC's intervention petition on July 19, 2004,⁴ and admitted these and other contentions as supported by the bases set forth in its decision.

The NIRS/PC contention regarding plausible strategy (EC-3/TC-1) was admitted by the Board based on three alleged deficiencies in the Environmental Report. *Id.* At 67, 78. Specifically, this contention was based on NIRS/PC's claims (a) that the statement by LES that access to an exhausted uranium mine for disposal is inadequate to support a plausible disposal option, (b) that the representation that discussions had been held with Cogema regarding a private conversion facility were without substance, and (c) that the representation by LES that disposal of DU could be accomplished by transfer to DOE was not plausible.

With respect to the last basis for this contention, NIRS/PC argued that under the USEC Privatization Act, DOE is only obligated to accept DU if it is classified as low level waste and the properties of DU are such that it must be classified as greater than Class C waste, requiring disposal in a deep geological repository. NIRS/PC Contentions at 25, 27-31. Noting that this contention raised a novel issue - the classification of DU as low-level waste - the Board referred it to the Commission pursuant to 10 C.F.R. § 2.323(f). LBP-04-14, 60 NRC at 67. The Commission accepted the issue for review,⁵ and issued its decision on January 18, 2005.⁶ In its decision, the Commission determined that DU is a form of low-level waste and, therefore, disposal by DOE pursuant to Section 3113 of the USEC

Privatization Act is a plausible strategy. CLI-05-05, slip op. at 17. Accordingly, the

⁴ *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004).

⁵ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004).

⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-05, 61 NRC __ (January 18, 2005)

Commission reversed the admission of this basis of NIRS/PC's contention. *Id.*

The NIRS/PC contention regarding the impacts of conversion (EC-4) was admitted based on the deficiency alleged - that the ER failed to discuss the environmental impacts of construction and operation of a plant to convert the DU waste to a more stable form for disposal. 60 NRC at 67-68, 78. The contention challenging the decommissioning costs presented by LES (EC-5/TC-2) was admitted based on the allegations that (a) the contingency factor used by LES is too low, (2) the cost of capital used by LES is too low, and (c) the costs are based on an incorrect assumption that they relate only to low-level waste. *Id.* at 67-68, 78.

Following the Board's ruling on the admissibility of contentions, the Board issued a ruling setting forth a general schedule for this proceeding.⁷ A deadline of October 20, 2004, was established for late-filed contentions, following the scheduled September, 2004, issuance of the Draft Environmental Impact Statement ("DEIS"). NIRS/PC filed late contentions in accordance with that schedule, some of which were admitted by the Board. The Board declined to admit any late contention relating to the issue of classification of DU due to the fact that it was pending before the Commission, but noted that it was doing so without prejudice to a renewed motion" should the Commission hold that the Board should hear the waste classification issue. . .⁸ The Board admitted additional bases for Contention EC-4 based on alleged inadequacies in the DEIS and for Contention EC-5 based on information obtained during discovery. Regarding EC-4, the Board admitted an additional basis alleging that the DEIS improperly relied on environmental reviews conducted by DOE. *Id.* at 14-15. With regard to EC-5, the Board admitted an additional basis alleging that LES had failed to provide a relevant estimate for the cost of converting and disposing of DU. *Id.* at 16-17.

In the course of the Staff's review of the LES application, which is still ongoing, the Staff sent LES a request for additional information regarding the decommissioning funding plan on October 20, 2004 (ADAMS Accession number ML042600287). Among other things, the Staff

⁷ *Memorandum and Order* (Memorializing and Ruling on Matters Raised in Conjunction with August 3, 2004 Conference Call and Setting General Schedule for Proceeding), August 16, 2004.

⁸ *Memorandum and Order* (Ruling on Late-Filed Contentions) November 22, 2004, slip op at 15.

requested further information to justify or adjust estimated costs which are based on estimates in a Lawrence Livermore National Laboratory (“LLNL”) report. LES submitted responses on December 10, 2004 (ADAMS Accession number ML043500702) and on January 7, 2005 (ADAMS Accession number ML05013145). In its January response, LES stated that it did not believe that it was meaningful to revise historical cost estimates such as those in the LLNL report and instead provided estimates of the costs of the components of the total cost based on information from vendors.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Contentions.

Because the time for filing contentions in the proceeding has passed,⁹ the contentions proposed by NIRS/PC must meet the standard established for late filings in 10 C.F.R. § 2.309(c)(1)(I-viii). That regulation provides that non-timely contentions may be admitted based on a balancing of the following factors:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of petitioner’s right under the [Atomic Energy] Act to be made a party to the proceeding;
- (iii) The nature and extent of petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the petitioner’s interest;
- (v) The availability of other means whereby petitioner’s interest will be protected;
- (vi) The extent to which petitioner’s interests will be represented by existing parties;
- (vii) The extent to which petitioner’s participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which petitioner’s participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(I-viii).

NIRS/PC, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor of their admission by affirmatively addressing the lateness factors in its petition. Thus, NIRS/PC must demonstrate that a balancing of the factors warrants overlooking the lateness of their contentions. *Boston Edison Co.* (Pilgrim

⁹ See, “Notice of Receipt of Application for License; Notice of Availability of Applicant’s Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order” CLI-04-03, 59 NRC 10 (2004), 69 Fed. Reg. 5873 (Feb.6, 2004).

Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000); *aff'd*, CLI-04-04, 59 NRC 31 (2004). Absent a showing of good cause, a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing is necessary. See, *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

In making a judgment about good cause, emphasis is placed on when sufficient information was made available to the petitioner so as to make it possible for the petitioner to raise and frame the contention with reasonable specificity and basis. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999), *citing*, *Duke Power Co.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 338 (1999). Good cause does not exist when the late-filed contentions were not based on new information arising after the original deadline and therefore could have been included in a timely petition.

In addition to demonstrating that a balancing of the late-filing criteria warrant admission, the petitioner must meet the requirements for admissible contentions in 10 C.F.R. § 2.309(f)(1). That regulation provides that a contention must include: (1) a specific statement of the issue of law or fact raised, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action which is the subject of the proceeding, (5) a concise statement of the alleged facts or expert opinions supporting the contention and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

II. Contentions EC-3/TC-1 and EC-4.

A. Application of the Late Filing Criteria to NIRS/PC's Supplement to Contentions EC-3/TC-3 and EC-4.

As presently admitted, NIRS/PC's Contention EC-3/TC-3 reads as follows:

Petitioners contend that Louisiana Energy Service, L.P., (LES) does not have a sound, reliable, or plausible strategy for private sector disposal of the large amounts of radioactive and hazardous Depleted Uranium Hexafluoride ("DUF₆") waste that

the operation of the plant would produce in that:

(A) The statement (LES Environmental Report (ER) 4.13-8) that a ConverDyn partner, General Atomics, “may have access to an exhausted uranium mine. . . where depleted U_3O_8 could be disposed” represents a grossly inadequate certitude for a “plausible strategy” determination, particularly for a radioactive and hazardous substance which has been accumulating in massive quantities in the United States for fifty-seven years without a plausible disposal program.

(B) Similarly, the statement that “discussions have recently been held with Cogema concerning a private conversion facility (ER 4.1308) is without substance.

NIRS /PC seeks to amend this contention to add the following additional bases:

(D) LES has not presented any reasonable or credible plan for deconversion, transportation, and disposal that meets the Commission’s standards for a “plausible strategy.” LES has only stated cost estimates for deconversion, transportation, and disposal, without showing the elements of the plan to which such estimates apply or identifying the sources of the estimates. LES has no[t] adequately described decommissioning strategy.

(E) Methods of disposal of depleted uranium described by LES or referred to by Commission Staff in the Draft Environmental Impact Statement, such as shallow land disposal or burial in an abandoned mine, do not constitute a plausible strategy, because such proposed methods would fail to meet applicable health requirements, such as the Commission’s standards for disposal of low-level radioactive waste.

NIRS/PC also seeks to amend Contention EC-4 to add the following:

Contention: The DEIS fails to discuss the environmental impacts of the transportation and disposal of depleted uranium. The analyses of disposal methods in the DEIS are unsupported and technically deficient, and such proposed methods would fail to meet relevant health requirements, such as the Commission’s standards for disposal of low-level radioactive waste. Thus, the DEIS lacks adequate information to make an informed licensing judgement.

NIRS/PC Motion at 7-8. In order to establish good cause for filing these additional bases and contention, NIRS/PC cites the Commission’s ruling of December 8, 2004, on the classification of DU as low-level waste and the January 7, 2005, LES response to a Staff request for information. However, it is clear from NIRS/PC’s description of the issues it wishes to pursue that these supplemental bases are matters which NIRS/PC could have raised before these recent developments. As discussed above, good cause is only established if the information on which the contention is premised was not available so that a timely filing was not possible.

In its new Basis (D), NIRS/PC claims that LES has “not adequately described” its decommissioning strategy. However, this is obviously a question of the adequacy of the application - not a matter first raised in the Commission’s recent ruling or the recent RAI response. The RAI

response does not explain LES's strategy for disposing of the tails but rather responds to Staff's request for additional information in order to determine whether cost estimates provided by LES are reasonable and sufficient to provide for decommissioning funding. The Staff's request, and the substance of the RAI response, is the subject of EC-5/TC-2, not this contention which concerns the issue of whether LES has a plausible means for disposition of DU.

The other new basis NIRS/PC seeks to admit - Basis (E) - is also not a matter which was first raised in the Commission's decision or the RAI response. The question of whether the disposal options described by LES in the application or the Staff in the DEIS will meet applicable health requirements is one that could and should have been raised upon issuance of those documents. NIRS/PC could have raised this issue within the original contention deadline set by the Commission and any issues concerning the DEIS by the late-filing deadline set by the Licensing Board. Despite filing contentions at both times, NIRS/PC did not raise this issue and it was not, therefore, addressed by this Board. For that reason, it was not an issue certified to or considered by the Commission. As the Commission stated:

The current issue before us is a narrow one. We consider only whether depleted uranium is properly considered low-level radioactive waste, and thus whether transfer of the LES tails to DOE pursuant to Section 3112 of the USEC Privatization Act constitutes a "plausible strategy" for disposal of tails. We need not address any of the other waste disposal options. . . that LES has proposed.

CLI-05-05, slip op. at 3.

Moreover, it is clear from NIRS/PC's discussion that the information upon which it predicates these new bases was available in the NEF application and the DEIS. Indeed, much of the discussion repeats and elaborates on arguments NIRS/PC made in advancing contentions in its original intervention petition.¹⁰ The remaining discussion takes issue with the application, the DEIS and the Final Environmental Impact Statement prepared for the Claiborne Enrichment Center, all of which were available before the earlier filing deadlines for contentions.

NIRS/PC also advances a new contention to supplement EC-4, alleging deficiencies in the DEIS treatment of transportation and disposal of DU. Again, these are issues that could and should have been raised upon the issuance of the DEIS. NIRS/PC does not provide any reason

¹⁰ Compare, NIRS/PC Contentions at 29-31 and Late Filed Motion at 9-17.

for concluding that this contention could not have been formulated before the issuance of the Commission's decision or the cited RAI response which relates only to decommissioning costs.

Thus, when the substance of the supplemental bases and contention are considered, along with the documents relied upon, it is clear that NIRS/PC does not have good cause for filing at this time in the proceeding. Further, admission of these additional issues would delay this proceeding, particularly since the evidentiary hearing on Contention EC-4 has now been completed and the evidentiary record on that issue has closed. Both the factors of good cause for the failure to file on time and the extent to which the proceeding would be delayed (factors i and vii) therefore weigh against admission of these supplements to its contentions.

With regard the impact of the Board's decision on whether to admit these additional issues on the interests of NIRS/PC, it is significant that all of them relate to contentions already admitted. Thus, NIRS/PC will have the opportunity to participate as a party on the primary subject of each contention regardless of whether additional bases are admitted. Accordingly, the interests of NIRS/PC will be protected through other means in this proceeding, and factors (iv), (v) and (vi) generally weigh against admission.

Finally, with respect to the last criterion - the extent to which a petitioner's participation will assist in the development of a sound record - the Board looks to whether the petitioner has set out with specificity the issues it plans to cover, identified its prospective witnesses and summarized their proposed testimony. *Private Fuel Storage, supra*, 52 NRC at 224. As discussed below, NIRS/PC has not raised issues relating to its contention that LES does not have a plausible strategy for disposing of DU based on newly discovered information, but instead has reiterated arguments previously made and rejected, misinterpreted the Staff's DEIS and made generic attacks on the manner in which the NRC regulates radiation exposure. Overall, therefore, the late filing criteria weigh against admission of these additional bases and contention.

B. Admissibility of NIRS/PC's Supplement to EC-3/TC-1 and EC-4

NIRS/PC in its new Basis (D) alleges that LES has failed to describe a "plausible strategy" because it has failed to adequately describe its decommissioning strategy. This basis, as such, fails to advance an admissible issue because it is premised upon a fundamental misapplication

of the Commission's regulations. An applicant is not required to outline its decommissioning plan when it files an application for a license to operate and construct a facility. The submission and approval of a detailed decommissioning plan is called for in accordance with the provisions of 10 C.F.R. § 70.38, which provides for submission of a decommissioning plan for approval by the Commission after the license expires or the determination has been made to cease operations. See, 10 C.F.R. § 70.38(d).

The purpose of accounting for decommissioning activities at the time the license application is submitted is to estimate potential costs for the purpose of setting aside funding before operation begins. See, 10 C.F.R. § 70.25(e). In order to provide a meaningful estimate, LES must set forth a reasonable or creditable plan for disposing of the DU generated by the enrichment process. This is the "plausible strategy" contemplated by the Board in the previous licensing proceeding and addressed by LES in its application and the Staff in the DEIS. See, *Louisiana Energy Services, L.P.*, (Claiborne Enrichment Center), LBP- 97-3, 45 NRC 99, 105 (1997). It is not, however, intended to be a complete and detailed decommissioning plan. While NIRS/PC takes issue with the cost estimates LES has provided, this is the subject of another contention already admitted – EC-5/TC-2 – and is not an additional basis to challenge the strategy that LES proposes to use for disposing of DU.

In its new Basis (E), NIRS/PC argues that potential disposal options discussed in the DEIS; specifically, shallow land disposal and burial in a mine, are not plausible because disposal by those means would not meet applicable Commission standards for low-level waste disposal. To support this contention NIRS/PC claims that (1) a site specific analysis is necessary to determine whether shallow land disposal is feasible for DU and (2) near surface disposal may not meet NRC regulations under certain conditions. This does not raise a material issue of dispute because the Staff is in agreement on these points. As the Commission discussed in its recent decision on the classification of DU, the type of disposal that can be accomplished depends on the application of the standards in Part 61 to the specific waste and site being considered. CLI-05-05 at 11-12. This will be accomplished when a specific site and type of disposal is contemplated. Until that time, all that can be done is a general analysis of the options that are feasible. There is no reason to

believe, even given NIRS/PC's arguments, that disposal by the options discussed in the DEIS are not feasible under any conditions.

NIRS/PC also proposes supplementing EC-4 to allege that the DEIS fails to discuss the transportation and disposal of DU. This transportation contention, however, is completely unsupported. Absent any supporting facts or expert opinion, the contention lacks adequate support for admission under 10 C.F.R. § 2.309(f)(1).

NIRS/PC's remaining arguments are fundamentally unrelated to the proposed supplements to its contentions. These attempts to raise issues which have been previously rejected by the Board, such as the failure to consider conversion to DUO₂ (which is not contemplated by LES) and the alleged implausibility of the option of conversion by DOE because of that agency's "poor track record," as well as new issues such as the accuracy of dose calculations in the CEC EIS for mine disposal should be rejected. At this late time, NIRS/PC should not be permitted to rehash and redevelop arguments based on documents which have long been available, such as the Claiborne Environmental Impact Statement.

III. Contention EC-5/TC-2

A. Application of Late-Filing Criteria to NIRS/PC Supplement to Contention EC-5/TC-2.

NIRS/PC proposes to amend EC-5/TC-2 by adding the following supplement:

LES has presented additional estimates for the costs of deconversion, transportation, and disposal of depleted uranium for purposes of the decommissioning and funding plan required by 42 USC 2243 and 10 CFR 30.3, 40.36, and 70.25. See LES Response to RAI dated January 7, 2005. Such presentations are insufficient and contain no factual bases or documented support. The amounts for the current LES estimates, i.e., \$2.69/kgU for conversion, \$1.14/kgU for disposal, \$0.85/kgU for transportation, and a total of \$5.85kg/U including contingency, are greatly inadequate to achieve safe management and disposal of depleted uranium and cannot be the basis for financial assurance.

NIRS/PC Motion at 30.

In support of this contention, NIRS/PC cites the RAI response submitted by LES, claiming that these additional cost estimates were provided without supporting documentation or explanation. To the extent that this supplement is based on legitimate deficiencies in this new information, NIRS/PC has good cause for supplementing this contention. Further, given the fact that the evidentiary hearing on this contention has not yet been conducted, admission of this

supplement would not unduly delay the proceeding. Considering these, along with the other factors as discussed above, a weighing of the late filing criteria favor admission of this supplement.

However, the supplementation should be limited only to the issues concerning the adequacy of new cost estimates relied upon by LES. This is discussed in the NIRS/PC contention and the supporting discussion in Section A (NIRS/PC Motion at 30-31). The remaining discussion by NIRS/PC once again delves into unrelated issues, many of which have previously been rejected by this Board. Specifically, NIRS/PC's attempts to resurrect arguments regarding conversion to DUO_2 (and associated costs), conversion to anhydrous HF, reliance on DOE for conversion, and the nature of the risk to humans from uranium exposure should be rejected. Other issues, such as exchange rate uncertainties, have been evident since the time of the application and cannot be deemed to be premised on new information.

B. Admissibility of Supplement to Contention EC-5/TC-2.

To the extent that NIRS/PC has alleged that the new estimates provided by LES are not sufficiently supported, it has identified an admissible supplement to its contention regarding decommissioning cost estimates. This portion of the supplement, however, should be limited to the new contention as written and the supporting Basis A. The remaining arguments presented by NIRS/PC, contained in Bases B through J, are inadmissible because they are unrelated to the contention and the RAI response and concern options which are not contemplated by the licensee and impose standards which are inconsistent with NRC regulations.

In particular, NIRS/PC again attempts to claim that DU should be converted to DUO_2 , put into a ceramic form, and placed in a deep geological repository by claiming that the cost estimates must reflect this option. This argument, which is premised on NIRS/PC's argument that DU cannot be low-level waste, has been finally disposed of by the Commission. NIRS/PC also argues that the costs of converting to AHF should be considered notwithstanding the fact that LES has represented that this option will not be used. Additionally, NIRS/PC claims that additional contingency costs should be added to account for the failure of NRC regulations to properly account for uranium risk to women – an impermissible attack on Commission regulations. These attempts by NIRS/PC to resurrect claims which have previously been rejected by the Board and to create new arguments

based on documents which have long been available should be rejected.

CONCLUSION

For the reasons stated above, the factors which control the admission of late-filed contentions weigh against admission of all but one of the proffered contentions – NIRS/PC's supplement to EC-5/TC-2. In addition, for all but that one contention as limited by the arguments in Basis A, all of the supplemental bases and contentions proffered by NIRS/PC are not admissible under the Commission's regulations. Accordingly, the remaining late-filed contentions and bases should be rejected.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of March, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

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Docket No. 70-3103

ASLBP No. 04-826-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION ON BEHALF OF INTERVENORS NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR ADMISSION OF LATE-FILED CONTENTIONS" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 3rd day of March, 2005.

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